

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: <u>2/22/17</u>

-----x
SECURITIES AND EXCHANGE COMMISSION,

OPINION AND ORDER

Plaintiff

-against-

AMERICAN GROWTH FUNDING II, LLC,
PORTFOLIO ADVISORS ALLIANCE, INC.,
RALPH C. JOHNSON, HOWARD J. ALLEN III,
and KERRI WASSERMAN,

No. 16 CV 0828 (KMW)

Defendants.

-----x

KIMBA M. WOOD, District Judge:

I have reviewed de novo Magistrate Judge Freeman's thorough and fairly-reasoned Report and Recommendation ("R&R") that the Plaintiff Securities and Exchange Commission's ("SEC") motion to strike the Defendants' eighth and ninth affirmative defenses be granted. I adopt the R & R in full.

The Court notes Defendants' objections to the Report and Recommendation—particularly, that striking Defendants' eighth and ninth affirmative defenses would result in a violation of Defendants' constitutional rights. (Def. Mem. at 6). The Court does not agree. Defendants do not produce sufficient evidence to prove that any alleged misconduct by the Securities and Exchange Commission would rise to the level of constitutional violation necessary to allow for an affirmative defense that would otherwise be barred by law. (R & R at 6-7). Furthermore, the Court agrees with

Judge Freeman's conclusion that Defendants cannot prove the kind of prejudice necessary to sustain their ninth affirmative defense, predicated on the "unclean hands" doctrine. (R & R at 12).

The Court also remains unpersuaded by Defendants' argument that the S.E.C.'s motion should be denied as untimely. (Def. Mem. at 10-12). The Court is well within its power to consider the motion at this time. (R & R at 8). The public interest counsels in favor of consideration of the merits of the S.E.C.'s motion. The public interest also counsels in favor of allowing the S.E.C. to investigate securities claims free from "irrelevant, prolonged, and intrusive discovery." (R & R at 13 (citing SEC Mem. at 22)). The Court thus agrees with Magistrate Judge Freeman's finding that the SEC would be unduly prejudiced if forced to respond to Defendants' eighth and ninth affirmative defenses. (R & R at 13).

Plaintiff's motion to strike is GRANTED. This Opinion and Order resolves Docket Entry 41.

SO ORDERED.

DATED: New York, New York

February 22, 2017

Kimba M. Wood

KIMBA M. WOOD

United States District Judge